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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 278.

THE NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY,
Petitioner,

v.

L. P. BREWER, FORMER COLLECTOR OF INTERNAL REVENUE.

PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered on April 17, 1941, reversing the decision of the United States District Court for the Eastern District of Tennessee, which was in favor of the petitioner.

The opinion of the District Court (R. 80-98) is not officially reported. The opinion of the Sixth Circuit (R. 105-110) is reported in 119 F. (2d) 313.

This is a suit for the recovery of income and profits taxes erroneously and illegally assessed and collected for the calendar year 1920. The sole issue is whether the refund is barred by the five year provision for suit contained in Section 1113 (a) of the Revenue Act of 1926, reenacting Section 3226 of the Revised Statutes. The petitioner's suit was begun in the District Court within five years after payment of the entire tax for 1920, including a deficiency assessment made several years later. The Commissioner has conceded that he committed error in the imposition of the tax in controversy. The petitioner's claim for refund was proper and timely to recover the entire amount of overpayment.

This case fully meets the rules of this Court for the granting of the writ, and the denial thereof in the instant case does grave injustice.

The petitioner relies upon the following grounds:

(1) It is respectfully submitted that the decision of the Sixth Circuit in this case which reversed the District Court is in direct conflict with the decision of this Court in *United States* v. *A. S. Kreider Co.*, 85 L. ed. 946, decided May 26, 1941 (advance opinions) rendered after the decision of the Sixth Circuit herein, and *Hills* v. *United States*, 50 F. (2d) 302, 55 F. (2d) 1001 and 8 F. Supp. 849, which decisions construed the language of Section 1113 (a) favorably to the petitioner's view of the statute on the precise point in issue in this case, and is also in conflict with United States v. Clarke, 69 F. (2d) 748, decided by the Third Circuit, certiorari denied October 8, 1934, 293 U. S. 564; *Union Trust Co. of Rochester* v. *United States*, 70 F. (2d) 629, decided by the Second Circuit, certiorari denied October 8, 1934, 293 U. S. 564; *United States* v. *Magoon et al.*, 77 F. (2d) 804, decided by the Ninth Circuit, *Tait* v. *Safe Deposit & Trust Co. of Baltimore*, 78 F. (2d) 534, decided by the Fourth Circuit, affirming 8 F. Supp. 855, all of which construed language in other sections of the revenue acts similar to that contained in Section 1113 (a) of the Revenue Act of 1926.

(2) It is also respectfully submitted that in view of the great amount of litigation involving the construction of the statutory language in issue, the question here is one of importance in the administration of the internal revenue laws.

The issue in the instant case involves the meaning of the following language appearing in Section 1113 (a) of the Revenue Act of 1926, reenacting Section 3226 of the Revised Statutes, as amended:

> "No such suit * * * shall be begun * * * after the expiration of five years from the date of the payment of such tax * * *."

In the instant case, the petitioner's income and profits tax returns for the calendar years 1919 and 1920 disclosed a tax liability of $47,014.04 and $70,698.13 for those respective years. The taxes were paid in installments during 1920 and 1921. (Findings 3 and 4, R. 80-81.) On April 4, 1925, the Commissioner of Internal Revenue completed his audit of those returns, in which he showed the total tax due for the years 1919 and 1920, and determined deficiencies in tax of $72,265.33 for 1919 and $249.40 for 1920, which were thereafter assessed and paid on June 12, 1925. (Findings 6 to 10, inclusive, R. 81-83; Exhibits A and B, R. 28-40.) The great disparity between the deficiency assessments for 1919 and 1920 was due to the fact that in the audit, the Commissioner increased the reported net income of $339,485.83 for 1919 (Finding 3, R. 80) to $483,698.70 (R. 35), and decreased the reported net income of $455,228.62 for 1920 (Finding 4, R. 81) to $359,579.40. (R. 40.) In this audit, which started the entire controversy here, the Commissioner excluded the petitioner's life insurance reserves from its invested capital.

On July 10, 1925, the petitioner filed a proper and timely claim for refund of $72,514.83 (or such greater amount as is legally refundable) for the years 1919 and 1920 asserting that such exclusion was error. (Finding 11, R. 83; Exhibit D, R. 42-43.) The Government in its brief in opposition (p. 4) states that the petitioner's claim for refund

was filed on June 10, 1925. This was obviously a clerical error, as the claim was filed on July 10, 1925, after the payment of the deficiency assessments.

The petitioner's suit in the District Court to recover the taxes erroneously and illegally assessed and collected for the years 1919 and 1920 on this same ground was begun on June 7, 1930 (Finding 20, R. 90, R. 5), within five years of the payment of the entire tax for those years, including the deficiency assessments paid on June 12, 1925.

It was subsequently determined that the Commissioner's action in excluding the petitioner's life insurance reserves from invested capital was error. *Duffy* v. *Mutual Benefit Life Ins. Co.*, 272 U. S. 613, decided November 29, 1926, and *Moncure* v. *Atlantic Life Ins. Co.*, (C. C. A. 4) 44 F. (2d) 167, decided October 21, 1930, certiorari denied 283 U. S. 823. (Findings 18 and 19, R. 89-90.)

On October 14, 1931, during the pendency of the present suit in the District Court the Commissioner restored the petitioner's life insurance reserves to invested capital, and issued to the petitioner certificates of overassessment of $22,631.31 for 1919 and $15,622.19 for 1920. On November 11, 1931, the Commissioner refunded the overpayment of $22,631.31 with interest for 1919, but only refunded $249.40 with interest for 1920, the latter amount being the deficiency assessment. (Findings 18 and 19, R. 89-90.) The Commissioner held that the balance of the overpayment of $15,372.69 for 1920 was barred on the alleged ground that the suit was not begun within five years of the payment of the original tax. (Exhibit J, R. 63.) The $15,372.69 was part of an installment of original tax paid December 13, 1921 on account for 1920. (Finding 20, R. 90-91; Finding 4, R. 81.) The petitioner's cause of action here did not accrue upon the payment of the original tax, but came into being when the Commissioner in 1925 erroneously excluded its life insurance reserves. Part of the original tax for 1920 became refundable upon the restoration of its life insurance reserves, because of the shifting of income from 1920 into 1919 made

by the Commissioner in his audit, which was completed on April 4, 1925.

On March 12, 1934, the petitioner with leave of the District Court filed an amended petition to confine its suit to the unrefunded balance of $15,372.69 with interest for 1920, and as this amended petition involved the same parties, and the same cause of action, it related back to the suit which was begun on June 7, 1930. (R. 19-63.)

The Government's position is that the five year period for suit mentioned in Section 1113 (a) of the Revenue Act of 1926 is to be calculated from the date each installment of original tax for the year 1920 is paid on account, and if an installment representing a part of the illegal collection for a year is beyond the five year period, no recovery can be had, even though the claim for refund is filed in due time to protect the entire overpayment, or stated differently, a suit begun within five years of the payment of the entire tax for 1920, including a deficiency assessment subsequently determined, is not timely if part of the illegal collection was beyond the five year period, which view is wholly contrary to the decision of this Court in the *A. S. Kreider Co.* case, *supra*, and wholly contrary to the decision of the United States Court of Claims in the *Hills* case, *supra*, on the precise point in issue.

Mr. Justice Murphy, who delivered the unanimous opinion of this Court in the *A. S. Kreider Co.* case, *supra*, stated in part as follows (85 L. ed. 946, 947, footnote 2, 947-948):

> **"Undoubtedly, respondent has failed to begin its action within either of the periods specified in section 1113(a). See A. S. Kreider Co. v. United States (CCA 3d) 97 F. (2d) 387, 388. The suit was not instituted until March 7, 1932, although the last tax payment was made on July 26, 1926, and the claim for refund was disallowed in October, 1929.** (2) * * *."

(2) **"It should be noted that this action seeks recovery of money which was paid in 1921. We assume, so far as this decision is concerned, that the phrase 'such**

tax' in the quoted language refers to the total tax for the year in question whenever determined and assessed; or stated differently, that 'payment' within the meaning of the statute does not occur until the entire tax for 1920 is paid, including deficiency assessments made several years later. Compare Union Trust Co. v. United States (CCA 2d) 70 F. (2d) 629."

This statement of the law is a vital part of the decision of this Court. The suit was barred because it was brought more than five years after the entire tax for 1920 was paid.

In the *A. S. Kreider Co.* case, *supra*, the income tax return disclosed a tax liability of $52,481.97 for 1920 which was paid in full in 1921 and thereafter upon audit a deficiency assessment of $1,362.50 resulted, which was paid on July 26, 1926. In October, 1929, the Commissioner determined an overpayment of $14,833.68, of which $1,362.50 was refunded, and the Commissioner held the balance barred by limitation. Suit was brought for the balance withheld on March 7, 1932, more than five years after the payment of the entire tax for 1920, including the deficiency assessment paid on July 26, 1926.

In the case at bar, the petitioner's income tax return disclosed a tax liability of $70,698.13 for 1920 which was paid in full in 1921 and thereafter upon audit a deficiency assessment of $249.40 resulted, which was paid on June 12, 1925. Suit was brought on June 7, 1930, prior to the expiration of five years after June 12, 1925, when the entire tax for the year 1920, including the deficiency assessment, was paid. In October, 1931, the Commissioner determined an overpayment of $15,622.19, of which $249.40 was refunded, and the Commissioner held the balance barred by limitation.

The A. S. Kreider Co. case and the case at bar are precisely parallel on the point which was decided by this Court, except that in the former case, the suit was brought more than five years after the tax for 1920 was entirely paid, whereas in the present case the suit was begun prior to the expiration of five years after the tax for 1920 was entirely paid.

In the *A. S. Kreider Co.* case, *supra*, suit was begun after the Commissioner determined the overpayment of tax, whereas in the case at bar, the suit was brought before such determination.

This Court in the *A. S. Kreider Co.* case decided that since the suit in that case was begun more than five years after July 26, 1926, when the deficiency assessment for 1920 was paid, it was not timely, or stated differently if the suit had been brought within five years of July 26, 1926, it would have been timely. The District Court in the case at bar held that since the suit here was begun within five years of June 12, 1925, when the deficiency assessment for 1920, was paid, it was timely. This is in entire harmony with the later decision of this Court in the *A. S. Kreider Co.* case, and the decision of the Sixth Circuit which adopted a contrary view should be reversed by this Court. The rule of law as announced by this Court in the *A. S. Kreider Co.* case, *supra*, concerning the five year period for suit in an income tax case, is perfectly clear, and squarely fits the case at bar. The petitioner here is striving to have the rule applied to its case. The denial of the writ here presents a unique and anomalous situation. This Court has announced the applicable law, yet its application is frustrated by the denial of the writ.

The Government in its brief in opposition (footnote 6, p. 9) concedes that the issue which is present in this case was decided by the *A. S. Kreider Co.* case, *supra*.

It inflicts a grave injustice to the petitioner here to hold that so far as the decision in *A. S. Kreider Co.* case is concerned, the rule is as we contend, yet so far as the decision in the instant case is concerned, the contrary rule of the Sixth Circuit will not be disturbed.

In the Government's brief in the *A. S. Kreider Co.* case, reference was made to the decision of the Sixth Circuit in the case at bar.

This Court in the *A. S. Kreider Co.* case, stated that recovery was sought of money paid in 1921. This Court in that case stated that,

> "We assume, so far as this decision is concerned, that the phrase 'such tax' in the quoted language refers to the total tax for the year in question whenever determined and assessed; or stated differently, that 'payment' within the meaning of the statute does not occur until the entire tax for 1920 is paid, including deficiency assessments made several years later."

This is precisely what we contend, and the decision of the Sixth Circuit in the instant case is precisely in conflict with the decision of this Court. How can this Court assume that the law is as announced in the *A. S. Kreider Co.* case, and yet deny the petitioner the benefit of the law by denying the writ? The statement of the law in the *A. S. Kreider Co.* case is clear and precise. It was announced as the law of the land by this Court on May 26, 1941, yet on October 13, 1941, it is not the law of the land because this Court refuses to apply it. What has happened to change the law of the land? Such a procedure denies substantial justice and is very unusual. This is a clear case of conflict with a decision of this Court, and the conflict ought to be resolved by following the law as announced in the *A. S. Kreider Co.* case, or by repudiating it after affording the petitioner a hearing.

The instant case does not involve a situation where a taxpayer made a late payment of tax in order to extend the statutory period of limitations. The deficiency assessment here resulted from an audit in 1925 wherein the Commissioner misconstrued the revenue act which gave rise to the suit in this case. The fact that original tax for 1920 became refundable upon a restoration of the petitioner's life insurance reserves was not the fault of the petitioner. The entire controversy emanated from the Commissioner's wrongful action in excluding such reserves in 1925. The petitioner had no cause of action until after the erroneous audit and payment of the deficiency assessments in 1925. The illegal collection should in equity and good conscience be restored to the petitioner, unless the language of Sec-

tion 1113 (a) of the Revenue Act of 1926 clearly bars the refund.

In the instant case, the illegal collection for 1920 amounted to $15,622.19, consisting of $15,372.69, representing part of the fourth quarterly installment of original tax, and $249.40, the deficiency assessment, which sums were paid to the respondent. Such illegal tax was wholly paid on June 12, 1925, when the deficiency assessment was paid. On June 7, 1930, before the Commissioner made refund of the deficiency tax, the petitioner here began its suit to recover the entire amount of such illegal tax which was traceable to the erroneous exclusion of its life insurance reserves. (Findings 19 and 20, R. 90-91; R. 5-13.)

The petitioner's suit was brought within five years of the entire payment of such illegal tax.

The entire chain of decisions, referred to in the fore part of this petition as supporting the petitioner's view of the statute, followed the case of *Hills* v. *United States, supra,* which introduced the doctrine that "payment" within the meaning of the statute does not occur until the entire tax is paid, including deficiency assessments, which doctrine received approval by this Court in the *A. S. Kreider Co.* case, *supra.*

The *Union Trust Co.* case, *supra,* cited by this Court in the *A. S. Kreider Co.* case, in support of that rule, is in entire harmony with our view. In the *Union Trust Co.* case, the following language appearing in Section 3228 of the Revised Statutes was under construction:

> "(a) All claims for the refunding * * * of any internal-revenue tax * * * must * * * be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax * * *."

This language for the purpose of judicial construction is similar to Section 1113 (a) of the Revenue Act of 1926 under consideration in the instant case.

Circuit Judge Swan, who delivered the opinion of the Court in the *Union Trust Co.* case, *supra*, stated in part as follows:

> " * * * The tax is not finally determined in amount until the Commissioner audits the return; the tax liability is unitary and not discharged until paid in full. Wherever the question has been presented, the courts have adopted the construction of the statute for which the executor contends. Hills v. United States (Ct. Cl.) 50 F. (2d) 302, on rehearing (Ct. Cl.) 55 F. (2d) 1001; United States v. Clarke (C. C. A. 3) 69 F. (2d) 748, opinion of March 1, 1934, affirming (D. C.) 5 F. Supp. 292; Magoon v. United States (D. C. Hawaii) 1933 C. C. H. 8755. Compare, as to income tax, San Joaquin L. & P. Corp. v. McLaughlin, 65 F. (2d) 677, 681 (C. C. A. 9); Blair v. Birkenstock, 271 U S. 348, 46 S. Ct. 506, 70 L. Ed. 983. This judicial construction finds strong corroboration in the legislative history of the Revenue Acts * * *."

Congress did not insert any provision in Section 1014 (a) of the Revenue Act of 1924 or Section 1113 (a) of the Revenue Act of 1926, providing a period of five years for suit for the recovery of any internal revenue tax after payment, whereby the amount of refund should not exceed the portion of the tax paid during the five year period immediately preceding the filing of suit. Such a restriction was inserted in provisions dealing with claims for refund of income and profits taxes, but the petitioner's claim for refund in this case filed on July 10, 1925, was in due time to protect the entire overpayment of tax, so that the distinction which exists between the period of time for filing claims for refund of income taxes as contrasted with the period of time for filing claims for refund of estate taxes is of no significance in the present case.

The rule of the *Hills* case, which rule was subsequently adopted in the *Union Trust Co.* case, and which was approved by this Court in the *A. S. Kreider Co.* case, has been the established law for many years, and the only decision

which is to the contrary is the decision of the Sixth Circuit in the instant case.

In the *Hills* case, *supra,* an estate tax return was filed on June 6, 1921, disclosing a tax liability of $17,748.42 which was paid on July 26, 1921. On April 24, 1925, the Commissioner determined a deficiency in tax of $1,727.60, which was paid on May 16, 1925. On October 2, 1926, the estate filed a claim for refund of $4,371.33. Additional claims for refund were filed on March 1, 1928 and April 30, 1929. On June 28, 1928, the estate received a certificate of overassessment of $4,080.81, but the Commissioner advised the estate that "since the claim for refund was not filed within four years next succeeding the date the sum of $17,748.42 was paid, only the amount shown to have been paid on May 16, 1925, or $1,727.60 is subject to refund." (50 F. (2d) 302, 303.) This suit was begun on April 29, 1930, within five years of May 16, 1925, when the deficiency assessment was paid, and the entire tax satisfied.

Judge Green, who delivered the opinion of the Court of Claims, on reconsideration of the demurrer, stated in part as follows (55 F. (2d) 1001, 1004):

> " * * * The suit would be in time under Section 3226, for the reason that it was begun within five years from the time the last payment was made and the whole of the tax paid, which was May 16, 1925."

In considering the *Hills* case on the merits, Judge Littleton, who delivered the opinion of the Court, made the following pertinent observation (8 F. Supp. 849, 853):

> " * * * In any event the suit was instituted within five years after final payment of the tax, and was therefore timely under Section 3226, R.S. as amended (26 USCA sec. 156)."

The decision of the Sixth Circuit in this case holding that since the suit was not begun within five years of the payment of the original tax for 1920, it was not timely, is also in direct conflict with the decision of the Court of Claims in

Hills case, and such a conflict is ordinarily sufficient for the granting of the writ.

The statute under construction in the *Hills* case is identical with the statute under construction in the *A. S. Kreider Co.* case and the instant case.

This Court in the *A. S. Kreider Co.* case adopted the doctrine of the *Hills* case.

In view of the direct conflict and the now uncertain state of the law to be applied to an important question, it is respectfully submitted that this petition should be granted, and that the prior order entered on October 13, 1941 denying the writ should be vacated.

Respectfully submitted,

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October, 1941.

CERTIFICATE OF COUNSEL.

I, Frederick Schwertner, attorney for petitioner, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

FREDERICK SCHWERTNER.